Supreme Court, U.S.
FILED
APR 24 1991
OFFICE OF THE CLERK

Nos. 90-1252 and 90-7501

In the Supreme Court of the United States

OCTOBER TERM, 1990

MARIO CARBALLO, PETITIONER

v.

UNITED STATES OF AMERICA

OSVALDO COELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly found harmless error in the admission of evidence regarding a co-defendant's conviction and in a government witness's disparaging statements about attorneys.

2. Whether the jury's exposure to a book about jury service was harmless.

3. Whether a trial error may be harmless in a case in which the jury reaches deadlock and an *Allen* instruction is given.

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OPINION BELOW

The opinion of the court of appeals (90-1252 Pet. App. A1-A58) is reported at 913 F.2d 861.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1990. A petition for rehearing was denied on December 4, 1990. 90-1252 Pet. App. A59-

A60. The petition for a writ of certiorari in No. 90-1252 was filed on February 4, 1991, and the petition in No. 90-7501 was filed on March 4, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of conspiracy to engage in racketeering activities, in violation of 18 U.S.C. 1962(d) and 1963 (Count 1), racketeering, in violation of 18 U.S.C. 1962(c) and 1963 (Count 2), conspiracy to possess 400 kilograms of cocaine with the intent to distribute it, in violation of 21 U.S.C. 846 (Count 22), and possession of 400 kilograms of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 23). Petitioner Carballo also was convicted of conspiracy to possess 5,000 pounds of marijuana with intent to distribute it, in violation of 21 U.S.C. 846 (Count 21). Petitioner Coello also was convicted on an additional count of conspiracy to possess cocaine with intent to distribute it (Count 24) and an additional count of possession of cocaine with intent to distribute it (Count 25). The district court sentenced Carballo to concurrent terms of 15 years' imprisonment on each count and Coello to an aggregate term of 35 years' imprisonment. The court of appeals affirmed. 90-1252 Pet. App. A1-A58.

1. This case was part of the so-called "Miami River Cops" prosecution. It involved charges against a number of Miami, Florida, police officers for a variety of offenses centering around large-scale narcotics violations that the defendants committed in the course of their official police duties. The first trial, in which petitioner Carballo was not a defendant, ended in a

mistrial. Petitioners and 13 other police officers were subsequently named in a 31-count indictment charging them with various racketeering, narcotics, civil rights, and tax offenses. All of the defendants except petitioners pleaded guilty or were convicted in a separate trial. Gov't C.A. Br. 1-4.

Petitioners' trial focused largely on three drug incidents: the "Tower Paint incident," the "Tamiami Marine rip-off," and the "Jones Boat Yard rip-off." Other evidence adduced at the trial related to plots by the policemen-defendants to murder government witnesses, bond-jumping by Coello, and large cash expenditures by both petitioners. Gov't C.A. Br. 5-6.

The Tower Paint incident involved two abortive attempts by petitioner Carballo and others in early July 1985 to steal approximately 5,000 pounds of marijuana from a van that was allegedly coming from the Florida Keys to be unloaded at a Tower Paint store in Miami. Unbeknownst to Carballo and his co-conspirators, the van they hoped to ambush had already been seized by legitimate law enforcement officers in Key Largo. Gov't C.A. Br. 6-7.

In the Tamiami Marine rip-off, which took place on July 12, 1985, petitioners and others successfully stole approximately 1,000 kilograms of cocaine from a boat tied up at the Tamiami Marine marina on the Miami River. Coello participated in the raid of the boat containing the cocaine, helped unload the cocaine, and beat one of the crewmen of the boat. Carballo stashed some of the cocaine in his police vehicle, took it to the premises of his carpet installation business, and later sold ten kilograms of the drug for $220,000. Gov't C.A. Br. 7-10.

The Jones Boat Yard rip-off occurred on July 28, 1985. Coello and other officers planned a raid on the boat yard, where they suspected that cocaine was being

unloaded. During the raid, the officers discovered approximately 400 kilograms of cocaine being loaded into a van by drug smugglers. Coello and other officers pushed six of the smugglers into the water, where three of them drowned. Carballo was not present at the theft, but he subsequently assisted his co-conspirators in selling 51 of some 400 kilograms of cocaine they had stolen during the raid on the boat yard. For his part in disposing of the cocaine, which yielded a net profit of $1.3 million, Carballo received $116,000 to split with another Miami police officer. The discovery of the drowned smugglers' bodies led to the investigation of petitioners and their co-defendants. Gov't C.A. Br. 10-14.

2. a. At petitioners' trial, Detective Alex Alvarez, the government's case agent, testified as a government witness. On cross-examination by one of petitioners' co-defendants, Alvarez was asked if he had been present when Rudolfo Arias, a co-conspirator and government witness, testified at the trial of co-conspirator Ricardo Aleman. In particular, Alvarez was asked if he had been present when Arias admitted that he had lied as a police officer. On redirect examination, the prosecutor inquired about the Aleman trial. Over a defense objection, Alvarez testified that Aleman was one of the "River Cops," and that he had been charged with guarding the cocaine during the Jones Boat Yard incident. When the prosecutor asked whether Aleman had been convicted, defense counsel again objected and the prosecutor withdrew the question. Gov't C.A. Br. 43-44; 90-1252 Pet. App. A16-A18. Presumably referring to defense counsel's original questions concerning the Aleman trial, the trial judge noted that "[t]he question has been interjected in the case." 90-1252 Pet. App. A17.

Arias subsequently testified as a government witness. On cross-examination, counsel for one of petitioners' co-defendants sought to develop Arias' admissions, first made at the Aleman trial, that as a police officer he had lied to secure the convictions of guilty arrestees and to "get rid of the scum." Gov't C.A. Br. 45. Arias said that "[t]he scum is the ones that were committing the crimes. Now me and your client are the scums because we committed the crimes." *Ibid.* The following exchange then took place (*id.* at 46):

> Q. Yesterday you said that it was lawyers who were tricking juries and lawyers who were helping people to lie and beat cases and fool the jury, isn't that what you said?
>
> A. Yes, sir.
>
> Q. So are they scum too?
>
> A. The defense attorney has a job to do. He wants to win the case, regardless if his client is guilty.
>
> Q. Is that your guilty [*sic*] of a defense attorney?
>
> A. I have been around a lot of defense attorneys, on some occasion the finest in the nation.
>
> Q. That's their job, to fool the jury?
>
> A. And win the case.
>
> Q. And win the case?
>
> A. Yes, sir. On some occasion they could be an innocent man, I don't agree. That's not the case in this case. The only innocent person, and he was just a little mistaken on the Tamiami, was Aleman.
>
> I told the Government about it. They did something about it. Aleman was convicted. I told them that Raimundo Betancourt was the one who did the crime. He pled guilty and he is facing 30 years. Many others have pled guilty.

Coello's counsel requested a mistrial. Four days later, the district court denied the motion for a mistrial and reinstructed the jury on the burden of proof, reasonable doubt, the presumption of innocence, and the credibility of co-conspirator witnesses. With respect to Arias's statement that "Aleman was convicted," the court told the jury that "the fact that any other person has been convicted is not proof in and of itself of the guilt of any other person in this case." Defense counsel did not ask the court to instruct the jury to disregard Arias's testimony about Aleman's conviction. Gov't C.A. Br. 46-47.

b. During his cross-examination, Arias testified that in connection with the first "River Cops" trial, in which he had been a defendant and which had ended in a mistrial, he and his attorney "prepared our defense to make a fool of the jury, to confuse the evidence so we can get a not guilty verdict." 127 R. 544; Gov't C.A. Br. 74. Arias also charged that defense counsel and their clients had "created * * * lies" in the present case, and he criticized the ethics of defense attorneys generally. 127 R. 544; 90-1252 Pet. 19-20 nn.2-3.

The district court twice admonished Arias for giving unresponsive answers (127 R. 545, 553) and then instructed the jury (127 R. 556) that

> [t]he integrity of the defense lawyers in this case has not been challenged in any way. These attorneys were not present in the first case and Mr. Arias' volunteered remarks directed to these attorneys should be disregarded by you entirely. Mr. Arias, please do not make remarks about these attorneys and answer only the question that they present to you and we'll move on much quicker. Do you understand?

c. After the first day of the jury's deliberations, the foreman checked out a library book entitled *What*

You Need to Know for Jury Duty. The foreman read the book in its entirety and was particularly interested in a chapter suggesting methods for organizing the jurors during the deliberative process. The next day, following some of those suggestions, the foreman held an election to fill the offices of jury secretary, manager of the evidence, and ballot taker. About a week later, the foreman brought the book into the jury room and showed some of his colleagues a page from the book that outlined the organizational steps he was following. Thereafter the book remained in a drawer for the foreman's occasional reference. No other juror read it. 90-1252 Pet. App. A37-A39.

3. The court of appeals affirmed petitioners' convictions. 90-1252 Pet. App. A1-A58. Although the court found the government's solicitation of Arias's testimony about Aleman's conviction to have been "patently improper," *id.* at A22, the court concluded that in "its proper context * * * this colloquy was not so prejudicial to the defendant's [*sic*] interests to require a reversal," *ibid.*, and that the district court's curative instruction had rendered the jury's exposure to the fact of Aleman's conviction harmless beyond a reasonable doubt, *id.* at A22-A23.

The court also rejected the claim that Arias's criticism of the defense bar generally and of defense counsel in this case in particular deprived the defendants of their right to a fair trial. Although it acknowledged that Arias was a "loose cannon," the court noted that Arias's comments had been "volleyed during defense cross-examination" and that the district court had "labored to restrain" Arias from making unsolicited remarks and had instructed the jury to disregard his non-responsive answers. 90-1252 Pet. App. A25. For those reasons, as well as the government's lack of involvement in the alleged misconduct,

the court concluded that Arias's statements could not have prejudiced the defendants. *Id.* at A25-A26.

The court also addressed the claim that the jury foreman's introduction of a book on jury service into the jury room made the trial unfair. The issue, the court said (90-1252 Pet. App. A41), was whether the jury's exposure to the extraneous material created a "reasonable possibility of prejudice." *United States* v. *Rowe*, 906 F.2d 654, 656-657 (11th Cir. 1990). Relying on *United States* v. *Bassler*, 651 F.2d 600, 601-603 (8th Cir. 1981), cert. denied, 454 U.S. 1151 (1982), a "surprisingly similar" case, Pet. App. A44, the court found that the book was "procedural material" that did not give rise to a reasonable possibility of prejudice, *id.* at A45.

The court noted (90-1252 Pet. App. A45-A46) that (1) only the foreman had read the book, and he found it useful only in providing a "logical framework" for the jurors' examination of the mass of evidence, (2) the book itself was "largely innocuous and patently juvenile," (3) its negative comments about attorneys merely repeated "existing stereotypes of the [legal] profession," and (4) the comments applied to all attorneys and were acknowledged by the author to be unfair. In light of the strength of the government's case, the nature of the book's content, and the *Bassler* precedent, the court concluded (*id* at A46-A47) that the district court had not abused its discretion when it determined that the jury's exposure to the book was harmless beyond a reasonable doubt. The court also concluded that the jury's exposure to the book did not render improper the district court's standard version of the "*Allen*" charge. See *Allen* v. *United States*, 164 U.S. 492 (1896).

ARGUMENT

1. Petitioners contend (90-1252 Pet. 23-43; 90-7501 Pet. 9-20) that the court of appeals failed to engage in a proper harmless error analysis because it did not review the whole record and did not determine that the evidence of petitioners' guilt was overwhelming. This contention is refuted by the opinion of the court of appeals, which shows plainly that the court examined the record as a whole, 90-1252 Pet. App. A23, A45, and assessed the strength of the government's case. *Id.* at A46-A47.

More specifically, petitioners argue (90-1252 Pet. 32-35; 90-7501 Pet. 13-16) that they were gravely prejudiced by Arias's testimony about co-defendant Aleman's conviction. The court of appeals, however, correctly concluded that the Arias testimony was not prejudicial to petitioners. That testimony, which consisted of a single, three-word sentence, came out during an extended and combative cross-examination of Arias by defense counsel. Any risk of significant prejudice caused by that brief remark was cured by the trial court's instruction to the jury to disregard it. See *United States* v. *Nickerson*, 669 F.2d 1016, 1020 (5th Cir. 1982). Moreover, the case against petitioners was quite strong; four police officer co-conspirators and seven civilian co-conspirators directly implicated petitioners in the charged offenses.

With respect to Arias's disparaging remarks about defense counsel, petitioners argue (see 90-1252 Pet. 36-39; 90-7501 Pet. 16-18) that the district court's cautionary instructions did not cure the prejudice they suffered because (1) Arias had suggested that the defense attorneys at petitioners' trial were trying to mislead the jury, (2) Arias had further suggested that the jurors in the first "Miami River Cops" trial

had been misled by defense counsel, and (3) Arias's negative comments about defense counsel were reinforced by statements in the book on jury service that the jury foreman had brought into the jury room.

The court of appeals correctly held that Arias's remarks did not prejudice petitioners. Like Arias's testimony about Aleman's conviction, those remarks were elicited during defense counsel's contentious cross-examination of Arias. The allegedly harmful remarks were isolated incidents in a complex, two-month trial in which 11 co-conspirators directly implicated petitioners in the charged offenses. The district court directed the jury to disregard Arias's remarks entirely, and jurors are presumed to follow instructions. See *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987). In addition, Arias himself was a convicted drug trafficker. As a result, his opinion with respect to the ethics of defense attorneys was not apt to have had much impact on the jury.

There is nothing surprising about the court of appeals' conclusion in this regard. Many courts have failed to find prejudicial error even when trial judges and prosecutors, let alone convicted drug dealers, have criticized or disparaged defense counsel. *E.g.*, *United States* v. *Williams*, 809 F.2d 1072, 1088-1089 & n.15 (5th Cir.) (court commented that "[s]ometimes the tactics of lawyers is to throw a smoke screen"), cert. denied, 484 U.S. 987 (1987); *United States* v. *Porter*, 441 F.2d 1204, 1214-1215 & n.4 (8th Cir.) (court admonished defense counsel for "blowing smoke rings"), cert. denied, 404 U.S. 911 (1971); *United States* v. *Sblendorio*, 830 F.2d 1382, 1395 (7th Cir. 1987) (prosecutor describes defenses as "phony," "bogus," and "manufactured," and tells jury it has been misled by defense lawyers), cert.

denied, 484 U.S. 1068 (1988). Comments by a trial participant, even if improper, are likely to be viewed by the jury as reflective of his position in the litigation, aligned with one side or the other. For that reason, such comments are seldom likely to be prejudicial, and, when made by a witness, may even tend to suggest bias on the part of the witness that would impair his credibility in the eyes of the jury.

2. Petitioners contend (90-1252 Pet. 39-43; 90-7501 Pet. 18-20) that the jury foreman's introduction of a book on jury service into the jury room was prejudicial. They point out that the book contains references to the "potential disgrace of a hung jury" and supports compromise verdicts that acquit defendants on some counts and convict them on others. They note that the foreman was exposed to that material, and other jurors may have been exposed to it as well. This fact-bound contention does not warrant further review.

Pursuant to Fed. R. Evid. 606(b),[1] the district court questioned the jury foreman, who had brought the book into the jury room.[2] The foreman testified unequivocally that, although he had read the entire book, he made no use of anything from the book except the information in one chapter about how to organize the jury for the purpose of discussing the evidence. 161 R. 2-5. The foreman said repeatedly that no other juror had read the book, and that only two

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[1] In relevant part, Fed. R. Evid. 606(b) provides that "a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention."

[2] Defense counsel became aware of the introduction of this extrinsic material when, after the discharge of the jury, the foreman gave an interview to the media. Gov't C.A. Br. 54.

or three other jurors even knew that the book was in the jury room. *Id.* at 5, 6, 16, 17, 27. He had brought the book into the jury room during the second week of deliberations, he said, and had kept it in a drawer in a table in the room. *Id.* at 11-13. The foreman testified that there was no discussion of any matter mentioned in the book, including legal definitions, in part because every juror had a copy of the indictment and the court's instructions. *Id.* at 5-6, 27.

In these circumstances, the district court's determination of lack of prejudice, based in part on its observation of the foreman's demeanor, is entitled to great deference. See *United States* v. *Key*, 859 F.2d 1257, 1264 (7th Cir. 1988); *United States* v. *Bagnariol*, 665 F.2d 877, 885 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982). The court of appeals therefore correctly concluded that the district court did not abuse its discretion when it denied petitioners' motion for a new trial. The limited, organizational use to which the book was put, the fact that it merely repeated common, albeit unflattering, stereotypes about lawyers, and the strength of the government's case against petitioners made it highly unlikely that the book affected the jury's verdict. See *United States* v. *Bassler*, 651 F.2d at 602-603 (no reasonable possibility of prejudice where juror took procedural notes from a book on jury duty and used them in an effort to develop an orderly method for jury discussions); *United States* v. *Bagnariol*, 665 F.2d at 887 ("Reviewing courts will not disturb jury verdicts on appeal when extraneous information relates only to issues not material to the guilt or innocence of the defendant."); cf. *United States* v. *Savage*, 701 F.2d 867, 870-871 (11th Cir. 1983) (no reasonable possibility of prejudice despite presence of antimari-

juana magazine in jury room during trial for possession of marijuana with intent to distribute).

3. Petitioners argue (90-1252 Pet. 43-46; 90-7501 Pet. 20-22) that there should be a *per se* rule that "constitutional" error "can never be deemed harmless where the jury deadlocked during its deliberations" and was given an *Allen* charge.[3] Regardless of the strength of the case against the defendant, the gravity of the error committed, and the effect of any curing instructions or other mitigating steps ordered by the trial judge, petitioners contend that the fact that the jury in this case was deadlocked and given an *Allen* charge precludes a finding that the error was harmless.

Harmless error analysis requires a fact-specific inquiry into the circumstances of a particular case and is thus not amenable to a broad *per se* rule like that advocated by petitioners. See *Kotteakos* v. *United States*, 328 U.S. 750, 762 (1946) (harmless error analysis "*in each case* must be influenced by conviction resulting from examination of the proceedings

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[3] Although petitioners would apparently apply the proposed rule only to "constitutional" error, the errors alleged in this case—the mention of a co-defendant's conviction, a witness's disparagement of defense lawyers, and the presence of the book in the jury room—do not appear to have violated any specific constitutional provision. Petitioners each assert that, at least as to the testimony concerning conviction of a co-defendant, the error "so threatens to undermine the impart[iality] of a jury as to deny Petitioner his Fifth Amendment right to a fair trial." 90-1252 Pet. 31 n.4; see 90-7501 Pet. 13 n.3. Insofar as petitioners are asserting that the errors rendered their trial fundamentally unfair, in violation of the Fifth Amendment, that assertion could be made about virtually any trial error. There is no reason to doubt the court of appeals' conclusion that the errors of which they complain had no such effect.

in their entirety") (emphasis added); see also *Johnson* v. *United States*, 318 U.S. 189, 202 (1943) (Frankfurter, J., concurring). Absent a review of the entire record, a reviewing court cannot know whether a temporary jury deadlock is the result of genuine division over whether the prosecution has proved its case or the sympathies of a single juror who was nonetheless convinced of the defendant's guilt.[4] Thus, although the facts that a jury was deadlocked and an *Allen* charge given may be of relevance in the inquiry, those facts alone are not dispositive.

The only cases cited by petitioners (90-1252 Pet. 44-45; 90-7501 Pet. 20-21) in support of their suggested *per se* rule are those in which, as this Court has recently explained, "structural defects in the constitution of the trial mechanism"—such as denial of the right to counsel to defendant or the financial interest of the judge in the outcome of the case—required *per se* reversal. *Arizona* v. *Fulminante*, No. 89-839 (Mar. 26, 1991) (opinion of Rehnquist, C.J., at 8). Those errors are subject to automatic reversal because of the difficulty of determining whether the defendants have been prejudiced. See *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927). The errors of which petitioners complain are instead trial errors for which an assessment of prejudice is possible. Thus, they are errors to which the harmless error rule applies. See *Fulminante*, opinion of Rehnquist, C.J., at 8-9. For that reason, the cases cited by petitioners do not support adoption of the proposed *per se* rule.

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[4] Cf. *United States* v. *Powell*, 469 U.S. 57, 63 (1984) (inconsistent verdicts can rest on something other than the jury's assessment of the defendant's guilt).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1991

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